85-1500 (1)

NO.

Supreme Court, U.S.
FILED
MAR 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States

October Term, 1985

ROLAND V. ACOSTA,
PETITIONER

VERSUS

THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; MR. GEORGE FISCHER, HEAD OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES; MR. CHARLES OLIVIER, ADMINISTRATOR OF THE SOUTH LOUISIANA MEDICAL CENTER IN HOUMA, LOUISIANA; AND WAYNE HEAP, ASSISTANT SECRETARY OF THE DEPARTMENT OF HEALTHAND HUMAN RESOURCES,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID W. OESTREICHER, II
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130
(504) 529-7666

RALPH S. WHALEN, JR.
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130
(504) 529-7666

COUNSEL FOR PETITIONER

50

QUESTION PRESENTED

Should a Notice of Appeal filed subsequent to announcement of a ruling on a Rule 59 Motion, but prior to entry of that ruling on the clerk's docket, be considered timely under Federal Rules of Appellate Procedure 4?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 2

Jurisdiction 2

Statutes Involved 3

Statement of the Case 4

Existence of Jurisdiction Below . . . 7

Reasons for Granting the Writ . . . 8

Conclusion 26

Certificate of Service 27

Appendix A - Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit A-1

Appendix B - Motions Panel Opinion of the United States Court of Appeals for the Fifth Circuit A-4

Appendix C - Opinion of the United States DistrictCourt for the Eastern District of Louisiana Awarding Attorneys Fees A-7

Appendix D - Per Curiam Order Denying Petition for Rehearing by the United States Court of Appeals for the Fifth Circuit A-8

Appendix E - Statutes and Rules Involved
. . . . . A-10

TABLE OF AUTHORITIES

CASES

Anderson v. Allstate Insurance Co.
630 F. 2d 677 (9th Cir. 1980) .17

Calhoun v. United States
647 F. 2d 10 (9th Cir. 1981). .9,
14-22,24

Griggs v. Provident Consumer Discount Company 459 U.S. 56, 103 S.Ct. 400, 74 L. Ed. 2d 225 (1982) 19

Harcon Barge Company, Inc. v. D & G Boat Rentals, Inc. 747 F. 2d 278 (5th Cir. 1981) 20

Markham v. Holt, 369 F. 2d 940 (5th Cir. 1966) 17

The Brickyard v. The Walker-Pinkston Companies, Inc. 735 F. 2d 1154 (9th Cir. 1984) 15,23

Tibbs v. Great American Insurance Company 755 F. 2d 1370 (9th Cir. 1985) 15

Williams v. Town of Okoboji
599 F. 2d 238 (8th Cir. 1979) . .17

STATUTES AND RULES

Federal Rules of Appellate Procedure 4 . . . . . i, 8-26

Federal Rules of Civil Procedure

Rule 12 (b) (6) 4

Rule 58 18

Rule 59 . . . . . .i,9,23

28 U.S.C. 1254 (1) 2
28 U.S.C. 1343 7
42 U.S.C. 1983 7
42 U.S.C. 1985 7

OTHER

Advisory Committee Notes to FRAP 4 (1979) 11,12,13,14

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

ROLAND L. ACOSTA,
PETITIONER

VERSUS

THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ET AL,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Roland L. Acosta, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 6, 1985.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is unpublished. The motions panel opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. The per curiam opinion of the United States Court of Appeals for the Fifth Circuit is unpublished. Each may be found in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in a per curiam opinion was entered on November 6, 1985. A timely petition for rehearing was denied on December 5, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

See Appendix E.

STATEMENT OF THE CASE

On September 29, 1981, petitioner Roland L. Acosta brought suit against the Louisiana Department of Health and Human Resources, George Fischer, Charles Olivier and Wayne Heap under 28 U.S.C. 1343, 42 U.S.C. 1983, 42 U.S.C. 1985 and the First and Fourteenth Amendments to the United States Constitution. The 1985 claim was dismissed on a Rule 12 (b)(6) Motion to Dismiss on February 19, 1982. The remaining claims against all defendants were dismissed on a Motion for Summary Judgment on December 15, 1982.

Plaintiff filed a Notice of Appeal on January 26, 1983. On February 23, 1983, the Fifth Circuit granted defendant's Motion to Dismiss the Appeal.

The defendants then moved for attorneys fees alleging that the

complaint was filed in subjective bad faith and that it was frivolous, unreasonable and without foundation. On June 7, 1983 Judge Patrick E. Carr issued an Order of Reference referring the matter to Magistrate Eileen Shaver to determine what attorneys fees, if any, should be awarded to defendants.

On July 29, 1983, Magistrate Shaver issued Findings and Recommendations recommending that attorneys fees be denied. Upon defendants' objections to those Findings and Recommendations, on April 10, 1984, Judge Carr rejected Magistrate Shavers' findings and determined that defendants were entitled to attorneys fees. Judge Carr referred the matter to Magistrate Fonseca for a determination of the amount of attorneys fees to be awarded. On May 21, 1984, Magistrate Fonseca recommended that the amount be $19,953.75. Judge Carr issued

an Order awarding that amount on June 25, 1984.

Plaintiff filed a Motion to Alter or Amend the Judgment on July 3, 1984. On August 1, 1984, a hearing was held on the motion and a ruling was issued by the court from the bench that the motion was denied. That afternoon, with full knowledge that the motion had been denied, plaintiff's attorney filed a Notice of Appeal. Two days later, on August 3, 1984, the Judgment on the Motion to Alter or Amend was entered on the docket. The Notice of Appeal was therefore filed after announcement but prior to entry.

Defendants filed a Motion to Dismiss the appeal alleging that the Fifth Circuit Court of Appeals lacked jurisdiction because the Notice of Appeal was filed prior to entry of the order denying the Motion to Alter or

Amend the judgment. On March 15, 1985, the motions panel of the United States Court of Appeals for the Fifth Circuit denied defendants' motion to dismiss the appeal. On November 6, 1985, the appeals panel of the United States Court of Appeals for the Fifth Circuit dismissed the appeal holding that the Notice was not timely filed. Plaintiff petitioned for rehearing, and on December 5, 1985, it was denied.

EXISTENCE OF JURISDICTION

The District Court for the Eastern District of Louisiana had jurisdiction over this Civil Rights action under 28 U.S.C. 1343, 42 U.S.C. 1983, and 42 U.S.C. 1985.

REASONS FOR GRANTING THE WRIT

The confusion surrounding the interpretation of FRAP 4 is a pervasive problem which should be dealt with promptly. In every civil case in the federal court system, a party who seeks to preserve his right to appeal must follow the procedure outlined in FRAP 4. Yet, that rule has met with varying interpretations by the courts which have considered it, rendering litigant and their attorneys often incapable of ascertaining the proper time for filing the Notice of Appeal. In order to ensure that every party who seeks to preserve his right to appeal is actually afforded that opportunity, this Court must promptly and definitively resolve the interpretational problem associated with the rule and presented by the case at bar.

The confusion associated with Rule 4 is easily seen in the preceeding in the Court of Appeals in this case. The motions panel of that court found that the appeal was timely because the Notice of Appeal was filed after "disposition" of the Rule 59 motion. See Appendix B at p. A-4. Yet, the appeals panel of the same court held that the appeal was untimely because the notice of appeal was filed "before the order disposing of its Rule 59 motion was entered". See Appendix A at p. A-1. The appeals panel decision directly conflicts not only with the motions panel opinion, but also with the Ninth Circuit case of Calhoun v. United States, 647 F. 2d 10 (9th Cir. 1981).

The interpretation of Rule 4 advanced by the Fifth Circuit appeals panel (1) is contrary to the language, purpose and spirit of FRAP 4, (2)

conflicts with other circuit decisions, (3) unjustly deprives parties of substantial appeal rights, and (4) threatens to destroy the practical functioning of Rule 4.

Review by this Court is necessary to ensure the integrity of Rule 4 and to set precedent under which litigants and attorneys throughout the United States may act to preserve the valuable right to take an appeal.

I. THE DECISION BELOW CONTRAVENES THE TEXT AND LEGISLATIVE HISTORY OF FRAP 4, WHICH MANDATES THAT A NOTICE OF APPEAL FILED AFTER ANNOUNCEMENT OF A RULING ON A RULE 59 MOTION, BUT PRIOR TO ENTRY, BE CONSIDERED TIMELY.

Federal Rule of Appellate Procedure 4 was designed as a framework under which the timeliness of a notice of appeal could be calculated. It specifically protects a party from losing his right to appeal by filing the notice of appeal prematurely.

FRAP 4 (a) (2); Advisory Committee Notes to Rule 4 (a) (1), 4 (a) (2), 4 (a) (4) (1979) In offering this protection, the drafters of the rule recognized the practice of filing the notice of appeal after the announcement of a decision or order but before the entry of the judgment or order. See Advisory Committee Notes to Rule 4 (a) (2) (1979). Rule 4 (a) (2) provides:

(2) Except as provided in (a) (4) of this Rule 4, a notice of appeal filed after athe announcement of a decision ororder but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

FRAP 4 (a) (2)

The drafters intended that except where the finality of a judgment was destroyed, the announcement of a decision from the bench would be

considered a final disposition of the case. Advisory Committee Notes to Rule 4 (a) (2) (1979). As such, an appeal could be filed immediately after the oral ruling, but prior to entry on the docket and still be considered timely.

Because the drafters were concerned with the finality of the judgment, they made an exception to Rule 4 (a) (2) where a Rule 59 or other motion destroyed the finality of the judgment. Advisory Committee Notes to Rule 4 (a) (2) (1979) In order to provide a time framework for those cases, Rule 4 (a) (4) states that "the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion". FRAP 4 (a) (4)

It is obvious that the drafters wanted to ensure that no appeal could be taken from a still-pending post-trial

motion. Yet, as in 4 (a) (2), the drafters had no reason to preclude the filing of a notice of appeal after announcement of a decision on the Rule 59 motion, since that announcement would make the decision final. Rule 4 (a) (4) provides that "a motion of appeal filed before the disposition [emphasis added] of any of the above motions shall have no effect". FRAP 4 (a) (4) In keeping with the spirit of the rule, "dispositions" must be read to include "announcement". For, once the ruling on a Rule 59 motion has been announced from the bench, the finality of the judgment is no longer suspended. Rather, the judgment is as final as the original announcement of a decision (without a Rule 59 motion). Because the drafters' primary concern was with the finality of the judgment, in a case where the judgment is made final by announcing

the ruling from the bench, even if that ruling is on a Rule 59 motion, there is no finality problem posed. Rather, a notice of appeal filed subsequent to announcement but prior to entry is timely filed. The language, purpose and spirit of
Rule 4 ensures a party his right to appeal.

II. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT DECISIONS WHICH HOLD THAT A NOTICE OF APPEAL FILED AFTER ANNOUNCEMENT OF A RULING ON A RULE 59 MOTION, BUT PRIOR TO ENTRY, IS TIMELY.

The Fifth Circuit Court of Appeals' decision in the case at bar denying jurisdiction because the notice of appeal was filed prior to entry of the judgment on the docket directly conflicts with decisions of the Ninth Circuit Court of Appeals. The Ninth Circuit case of Calhoun v. United States, 647 F. 2d 6 (9th Cir. 1981)

presents exactly the situation involved in the case at bar and hold that a notice of appeal filed after announcement of a ruling on a Rule 59 motion, but prior to entry, is timely. Calhoun, 647 F. 2d 10, 11 Calhoun has become the rule in the Ninth Circuit, and has subsequently been followed in such cases as Tibbs v. Great American Insurance Company, 755 F. 2d 1370, 1373 ftnt. 3 (9th Cir. 1985) and the bankruptcy case of The Brickyard v. The Walker-Pinkston Companies, Inc., 735 F. 2d 1154, 1155-56 (9th Cir. 1984).

Calhoun considered the interaction of Federal Rules of Appellate Procedure 4 (a) (2) and 4 (a) (4) and decided that "disposition" in Rule 4 (a) (4) meant "announcement" of the court's decision on the post-judgment of the motion. In reaching this conclusion, the Ninth

Circuit explored the language and polices underlying Rule 4. It noted that Rule 4 distinguishes between "announcement" or "disposition" of a decision or order, the filing of a judgment or order, and the entry of a judgment or order. But the distinctions "should not be utilized to create an abyss into which early appeals fall without effect. It would be contrary to the spirit of the rules to interpret the word"disposition" as meaning the date of a formal and proper entry of an order denying a post-judgment motion. " Calhoun, 647 F. 2d at 10 As footnote 4 of the Calhoun decision explains:

> "Entry is significant as the event from which the outer limits of the time within which to appeal is measured. Disposition or announcement of a decision or order is significant as the event which permits consideration of a notice of appeal filed thereafter but before such formal 'entry'".

Calhoun 647 F. 2d at 10

Such an interpretation of Rule 4

(a) (4) would not defeat the purpose of the 1979 amendments to rule 4. Rather, the Ninth Circuit's interpretation "gives meaning to the policy of 'exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon'". Calhoun, 647 f. 2d at 10 (Citing Williams v. Town of Okoboji, 599 F. 2d 238, 239-240 (8th Cir. 1979), quoting Markham v. Holt, 369 F. 2d 940-942 (5th Cir. 1966); See also Anderson v. Allstate Insurance Company, 630 F.2d 677, 681 (9th Cir. 1980)

The Ninth Circuit's decision logically construes Rule 4 (a) (4) to make ineffective only those notices of appeal filed before announcement of a decision or order. Under such a rule, where a judgment has not been made final

by announcement of the ruling on the motion from the bench, the filing of a notice of appeal would indeed be premature, under Rule 4 (a) (4). But where the announcement of the ruling has been made, where the judgment is final, Rule 4 (a) (4) would not operate to defeat the timeliness of the appeal. There would be "no significant possibility" that the filing of the notice of appeal would involve wasted effort. Further, the notice of appeal would embrace objections to the denial of the post judgment motion. Upon announcement of the decision, under Rule 58, an order should be prepared and entry should summarily follow. Calhoun, 647 F. 2d at 10

Calhoun, and the cases following it, are directly apposite to the case at bar, and are consistent with the policies underlying the U.S. Supreme Court decision of

Griggs v. Provident Consumer discount Company, 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982) In Griggs, the Court held that a notice of appeal is invalid if filed while a timely motion for reconsideration is pending because the district court and the appellate court should not consider simultaneously the same case at the risk of potentially inconsistent results and wasted judicial effort. Yet, as Calhoun noted, 647 F. 2d at 10, where an announcement of the ruling on the Rule 59 motion has been made prior to the filing of the notice of appeal, no simultaneous jurisdiction problem is posed. Further, any concern with wasted judicial effort evaporates because the announcement of the decision finalizes it in the same sense contemplated by Rule 4 (a) (2). Consequently, the notice of appeal filed prior to entry but after announcement must be treated as if filed after entry.

The well-reasoned Ninth Circuit case of Calhoun v. United States aptly interprets Rule 4 (a) consistently with the language and intent of the drafters of the rule, and it effectuates the policies inherent in the taking of appeals. It should be made the uniform interpretation of FRAP 4 (a) in the federal courts.

III. THE DECISION BELOW UNJUSTLY DEPRIVES PARTIES OF SUBSTANTIAL APPEAL RIGHTS.

There is no doubt that Rule 4 (a) (4) can be a harsh rule in the context of a case where filing of the notice of appeal is truly premature. See Harcon Barge Company, Inc. v. D & G Boat Rentals, Inc., 747 F. 2d 278, 281 (5th Cir. 1981) Yet, where the notice of appeal is filed before any announcement has been made, the harshness of the rule is at least justified. There can be no justification in the Fifth Circuit's

interpretation of Rule 4 (a) (4) to preclude a party's right to appeal where the judge has made a disposition of the Rule 59 motion by announcing his decision in court. Rather, the Fifth Circuit's decision is "fraught with injustice". See Calhoun, 647 F. 2d at 10 As the Ninth Circuit stated:

"A party may believe that an order has been made and entered when a decision is announced or filed and may act promptly to take an appeal, only to find that the order was actually entered a day or two later. If Rule 4 (a) (4) is interpreted to mean that the filing of a notice of appeal is a nullity because filed before formal entry of an order, and if the time for filing a motion for extension of time based on excusable neglect has run, see FRAP 4 (a) (5), valuable rights may be lost because an important, but ministerial, act was not performed when expected."

Calhoun, 647 F. 2d 10, 11

The drafters of Rule 4 exhibited their intent to ameliorate the harshness of the rule by amending Rule 4 (a) (2) to treat a "premature" filing of the notice of appeal, that is, a notice of appeal filed after announcement of a decision or order but before the entry of the judgment or order, as filed after entry and on the day of entry. See FRAP 4 (a) (2) There is no sound reason for the Fifth Circuit's exacerbation of the harshness of Rule 4 in the context of the case at bar. The Fifth Circuit decision effectively penalizes a party for making a post judgment motion, since after announcement of the ruling on that motion the judgment is as final as a judgment announced in a case without apost-judgment motion. A party's substantial and valuable appeal rights must be preserved. The Fifth Circuit's

decision in the case at bar must not be allowed to stand.

IV. THE DECISION BELOW THREATENS TO DESTROY THE INTEGRITY OF RULE 4 OF THE FEDERAL RULES OF APPELLATE PROCEDURE.

Rule 4 of the Federal Rules of Appellate Procedure is widespread in its use and application, reaching the ordinary case where no post judgment motion is filed, reaching a variety of cases involving Rule 59 and other post-judgment motions, and even finding application in bankruptcy cases. See FRAP 4; Matter of The Brickyard 735 F. 2d 1154 (9th Cir. 1984) The interpretation of Rule 4 implicit in the Fifth Circuit decision threatens the practical functioning and integrity of that rule by precluding a party's right to appeal even after the judgment on his motion has been announced from the bench. This interpretation of Rule 4, as

previously discussed, is contrary to the language, purpose and spirit of Rule 4. It conflicts with other circuit decisions, rendering Fifth Circuit litigants subject to unfair and disparate treatment. It exacerbates the harshness of the rule. Together, these factors illustrate the illogic of the Fifth Circuit holding.

But it is not illogical for a party to file his notice of appeal after announcement of a ruling on a post-judgment motion, but prior to formal entry. As Calhoun noted, a party expects the ministerial act of entry of the order on the docket to occur promptly. Calhoun, 647 F. 2d at 11 Further, because the ruling has been announced from the bench, all parties are cognizant that the judgment is final--everyone knows the disposition of the motion. It defies common sense to

have a rule, such as the Fifth Circuits', which could cause widespread loss of substantial and valuable appeal rights. This court should review the Fifth Circuit decision.

CONCLUSION

This court should review this case because of the conflict existing between the Fifth Circuit and the Ninth Circuit, the potential for further conflict and the importance of preserving substantial appeal rights in the federal court system.

For all of the reasons stated above, petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Fifth Circuit.

Respectfully Submitted,

DAVID W. OESTREICHER, II
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130
(504) 529-7666

RALPH S. WHALEN JR.
OESTREICHER, WHALEN & HACKETT

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court representing the Petitioner herein and that three copies of the above petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit were served upon counsel for the respondents, first class postage prepaid, addressed to their offices in New Orleans, Louisiana, this 28th day of February, 1986.

DAVID W. OESTREICHER, II

RALPH S. WHALEN, JR.

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-3536

ROLAND ACOSTA,

Plaintiff-Appellant,

versus

LOUISIANA DEPARTMENT OF
HEALTH & HUMAN RESOURCES, ET AL

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

November 6, 1985

Before GOLDBERG, RANDALL and JOHNSON, Circuit Judges. PER CURCIAM:*

On March 15, 1985, a motions panel of this Court denied the motion of defendant-appellee to dismiss the appeal on the grounds that it was prematurely filed under Fed. R. App. P. 4 (a) (4). We of course are not bound by the ruling of the motions panel. See Fischer v.

United States Department of Justice, 759 F.2d 461, 463 (5th Cir. 1985). We now reconsider the ruling of the motions panel. When a party has filed a motion under Fed. P. Civ. P. 59, as plaintiff-appellant did in this case, a notice of appeal filed before disposition of the Rule 59 motion "shall have no affect." Fed. R. App. P. 4 (a) (4) specifically provides that a "new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion" (emphasis added). Plaintiff-appellant filed its notice of appeal before the order disposing of its Rule 59 motion was entered. It is therefore a nullity, and we lack jurisdiction over this appeal. Accordingly, the appeal is DISMISSED.

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to the Rule, the court has determined that this opinion should not be published.

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-3536

ROLAND L. ACOSTA

Plaintiff-Appellant,

versus

THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

Before WILLIAMS, JOLLY and HILL, Circuit Judges.

BY THE COURT:

The Louisiana Department of Health and Human Resources has moved for dismissal of this appeal for lack of jurisdiction on the grounds that Acosta did not file a timely notice of appeal under Federal Rule of Appellate

Procedure 4 (a)(4). Because we find the notice of appeal was timely, the motion is denied.

The notice of appeal was filed after the disposition of the Motion to Amend and thus the notice was timely. Fed.R.App.P. 4(a)(4) provides that "(a) notice of appeal filed before the dispostion of . . . [a Rule 59] motion . . shall have no effect." In the present case it is undisputed that the notice of appeal was filed after the district court orally disposed of the Motion to Amend from the bench. Accordingly, the above-quoted language, which is the language relied upon by the state, does not invalicate the notice of appeal.

The department of Health and Human Resources' reliance on Van Wyk El Paso, Inc. v. Dollar Rent-A-Car Systems, 719 F.2d 806 (5th Cir. 1983) is unwarranted;

in that case attorneys merely spoke to the district court's law clerk, who informed them that the judge had decided to deny a motion for reconsideration under Rule 52. After this conversation with the clerk, the attorney filed the notice of appeal. A conversation with a law clerk is not a "disposition" of a motion, as is required by Rule 4 (a)(4). In the present case the court orally disposed of the only pending motion before any notice of appeal was filed. Accordingly, the motion to dismiss is DENIED.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROLAND L. ACOSTA	CIVIL ACTION
versus	No. 81-3930
THE LOUISIANA DEPARTMENT OF HEALTH & HUMAN RESOURCES, ET AL	Section J (4)

ORDER

The Court, after considering the motion, the record, the law applicable to the case, and the Magistrate's Amended Finding and Recommendation, hereby approves the Magistrate's Amended Finding and Recommendation and adopts it as its opinion herein. Accordingly,

IT IS ORDERED that attorney's fees in the amount of $19,953.75 be awarded the defendants.

New Orleans, Louisiana, this 18th day of June, 1984.

UNITED STATES DISTRICT JUDGE

Appendix D

FOR THE FIFTH CIRCUIT

NO. 84-3536

ROLAND ACOSTA,

Plaintiff-Appellant,

versus

LOUISIANA DEPARTMENT OF
HEALTH & HUMAN RESOURCES, ET AL

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(December 5, 1985)

Before GOLDBERG, RANDALL, and JOHNSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Appendix E
Rules

Rule 4. Appeal as of Right--When Taken.

(a) APPEALS IN CIVIL CASES

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of a appeals shall note thereon the date on which it was received andtransmit it to the clerk of the district court and it

shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b);(ii) under Rule 52(b) to amend or make additional findings of fact,

whether or not an alteration of the judgment would be
required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motions as provided above. No additionalfees shall be rerquired for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).

Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Rule 59. New Trials; Amendment of Judgments.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for a new trial is based upon affdavits they shall be served with themotion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion

for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) MOTION TO ALTER OR AMEND A JUDGMENT.

A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

NO. 85-1500

Supreme Court, U.S.
FILED
APR 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

ROLAND V. ACOSTA,
PETITIONER

VERSUS

THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES: MR. GEORGE FISCHER, HEAD OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES: MR. CHARLES OLIVIER, ADMINISTRATOR OF THE SOUTH LOUISIANA MEDICAL CENTER IN HOUMA, LOUISIANA: AND WAYNE HEAP, ASSISTANT SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

RESPONDANTS

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID W. OESTREICHER, II
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130

RALPH S. WHALEN
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TO SUPPLEMENTAL APPENDIX

Appendix F - Amended Finding and Recommendation A-1

Appendix G - Finding and Recommendation A-3

Appendix H - Finding and Recommendation A-11

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROLAND L. ACOSTA	CIVIL ACTION
versus	NO. 81-3930
THE LOUISIANA DEPARTMENT OF HEALTH & HUMAN RESOURCES, ET AL	SECTION "J"(4)

AMENDED FINDING AND RECOMMENDATION

Portions of this magistrate's Finding and Recommendation filed May 16, 1984, are hereby amended as follows:

FINDINGS

12. The "lodestar" amount of $19,953.75 is a reasonable fee considering all of the above factors.

RECOMMENDATION

It is recommended that the amount of $19,953.75 in attorney's fees be awarded to the defendants.

Failure to file written objections to the proposed findings and

recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, May 21, 1984

RONALD A. FONSECA
United States Magistrate

Appendix G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROLAND L. ACOSTA	CIVIL ACTION
versus	NUMBER 81-3930
LOUISIANA DEPARTMENT OF HEALTH & HUMAN RESOURCES, ET AL	SECTION "J"(4)

FINDING AND RECOMMENDATION

This matter was referred to the undersigned United States magistrate by the Honorable Patrick E. Carr, United States District Judge, for determination of reasonable attorney's fees to be awarded to the defendants.

STATEMENT OF THE CASE

Plaintiff, Roland L. Acosta, filed this civil action on September 29, 1981, against defendants, Louisiana Department of Health and Human Resources; Charles Oliver, Administrator of the South Louisiana Medical Center; and Wayne

Heap, Assistant Secretary of the Department of Health and Human Resources. Jurisdiction was alleged under 28 U.S.C ?1343, the First and Fourteenth Amendments of the United States Constitution, and 42 U.S.C ??1983 and 1985.

Judgment was entered in favor of the defendants on December 20, 1982 pursuant to defendants' motions to dismiss. Defendants subsequentlly filed a motion for attorney's fees, alleging that plaintiff's complaint was filed in subjective bad faith. Oral argument was heard before Magistrate Eileen Gleason Shaver on July 1, 1983. On July 28, 1983, Magistrate Shaver recommended that such motion be denied. Defendants filed a motion for review of the Magistrate's findings, which was argued before the District Judge on September 28, 1983. In his reasons issued April 10, 1984,

the Judge failed to adopt the Magistrate's findings, which was argued before the District Judge on September 28, 1983. In his reasons issued April 10, 1984, the Judge failed to adopt the Magistrate's findings. The Judge determined that the defendants were entitled to attorney's fees, and referred the matter to the undersigned Magistrate for determination of the amount to be awarded.

At the conference held before this Magistrate on May 3, 1984, counsel for both parties agreed that an evidentiary hearing was not necessary. Counsel for plaintiff stipulated that if a hearing was held, the defendants' witnesses would testify in accordance with the affidavits submitted.

FINDINGS

1. In determining the amount of attorney's fees to be awarded, the first

step is to determine the number of hours reasonable expended and multiply by a reasonable hourly rate. Hensley v. Eckerhard, ___ U.S.___, 103 S.Ct. 1933, ___ L.Ed.2d___ (1983).

2. The affidavits submitted by counsel for the defendants demonstrate that a total of 234.75 hours were expended in defense of this claim.

3. Those hours were reasonably expended by counsel for the defendants in the defense of this claim.

4. The affidavits submitted by counsel for defendants indicate that the hourly rate in private practice for legal services of this nature would be $85.00 per hour.

5. This Magistrate finds that $85.00 per hour is reasonable hourly rate for services rendered by counsel for the defendants.

6. The calculation of hours reasonably expended multiplied by a reasonable hourly rate represents a "lodestar" amount of $19,953.75.

7. The district court may adjust the "lodestar" amount of attorney's fees upward or downward depending upon the evaluation of various factors. Hensley v. Eckerhart, supra; Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983); Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982) (Cooper Liquor III); Cooper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980) (Cooper Liquor II).

8. The lodestar may be adjusted to reflect the contingent nature jof the suit and the quality of representation. Graves v. Barnes, supra, at 222. (citing Copper Liquor III, supra, at 1093); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 2980).

9. Factors to be considered in analyzing the "contingent nature of success" are: the plaintiff's burden, reflected in the complexity of the case, probability of defendant's liability, and difficulty in proving damage claims; the risks assumed, such as hourse of labor without guaranteed remunderation, out-of-pocket expenses, and prior expertise in the field; and delay in receipt of payment for services rendered. Graves v. Barnes, supra, at 222-23; Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp. 540 F.2d 102 (3rd Cir. 1976)(enbanc) (Lindy II).

10. Factors to be taken into account with respect to the "quality of representation" are: the results obtained, evaluated in terms of potential money damages available and benefit conferred on a class; and an

evaluation of professional methods uses. Graves v. Barnes, supra at 223; Lindy II, supra at 117-18; Merola v. Atlantic Richfiled co., 515 F.2d 164, 168-69 (3rd Cir. 1975) (Merola II).

11. There has been no showing by the parties which would support the increase or decrease of the "lodestar" in consideration of the above-stated factors.

12. The "lodestar" amount of $19,953.75 is a reasonable fee considering all of the factors discussed and the extent of success of the plaintiff.

RECOMMENDATION

It is recommended that the amount of $19,953.75 in attorney's fees be awarded to the plaintiff.

Failure to file written objections to the proposed findings and recommendations contained in this report

within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, May 16, 1984.

RONALD A. FONSECA

United States Magistrate

Appendix H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROLAND L. ACOSTA	CIVIL ACTION
versus	NUMBER 81-3930
LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOUCRES, ET AL	SECTION "J"(4)

FINDING AND RECOMMENDATION

This matter was referred to the undersigned United States Magistrate for determination of Defendants' Motion for Attorneys' Fees. Oral argument was heard on July 1, 1983, whereupon the matter was taken under submission

STATEMENT OF THE CASE

Plaintiff, Roland L. Acosta, filed his action on September 29, 1981 against defendants, Louisiana Department of Health and Human Resources, George Fischer, Head of the Department of

Health and Human Resources, Charles Olivier, Administrator of the South Louisiana Medical Center and Wayne Heap, Assistant Secretary of the Department of health and Human Resources.

Jurisdiction was alleged under 28 U.S.C. 1343, the First and Fourteenth Amendments and 42 U.S.C. ??1983 and 1985.

Plaintiff claimed that while he was employed at the South Louisiana Medical Center in Houma, Louisiana, he became aware of various illegal or unethical acts committed by defendants, Olivier and Heap, and that he reported these acts to defendant, George Fischer, in May 1980. Subsequently, he claims to have been harassed, made the subject of false charges and, finally, discharged in August, 1980.

Plaintiff sought damages for injury to reputation, mental anguish, embarrassment and humiliation, loss of

income and punitive damages. Plaintiff also sought reinstatement.

Defendants filed a Rule 12 (b) (6) motion to dismiss, which was granted as to the Section 1985 claim only.

Discovery commenced and plaintiff's counsel took the deposition of defendant, Charles Olivier, who was plaintiff's immediate supervisor. The deposition was taken on May 26, 1982. plaintiff noticed no other depositions.

On November 8, 1982, defendants filed a motion to dismiss the complaint against defendant, Department of Health and Human Resources, on the ground of Eleventh Amendment immunity, to dismiss the complaint against defendants, George Fischer and Wayne Heap, because respondeat superior is not a viable theory of liability under 42 U.S.C. 1983 and plaintiff had not alleged any actions by these defendants in

connection with his discharge, and to dismiss the claims for punitive damages against defendants, Department of Health and Human Resources, Fischer and Heap, under the theory of City of Newport v. Fact Concerts, Inc. ___U.S.___, 101 S.Ct. 2748 (1981).

Defendants simultaneously filed a motion for summary judgment alleging that plaintiff's complaint that he was discharged for exercise of his First Amendment rights was impossible because of the sequence of events set forth in affidavits attached to the motion.

Plaintiff filed no written opposition to any of the motions. Plaintiff's counsel failed to appear at oral argument on the motions before the District Judge on November 24, 1982. The judge granted the substantive motions dismissing the complaint in its entirety. The motion seeking dismissal

on the basis of failure to comply with a discovery order was dismissed as moot. Judgment was entered on December 20, 1982.

On January 26, 1983, plaintiff's counsel filed a notice of appeal. Defendants moved to dismiss the appeal as untimely. Plaintiff's counsel failed to oppose the motion to dismiss the appeal and it was granted by the Fifth Circuit.

Defendants then filed this motion for attorneys' fees, alleging that plaintiff's complaint was filed in subjective bad faith, that it was groundless because contrary to well-settled law and was factually impossible. In support of the motion for attorney's fees, defendants submitted affidavits of three attorneys indicating that they had expended a total of 134.75 hours in defense of the

action. Other affidavits were submitted in support of a request for an hourly rate of $85.00 in attorneys' fees.

FINDING OF FACT

1. Plaintiff filed this action in the belief that various personnel actions of the defendants were taken in retaliation for his exercise of his First Amendment rights. There is no evidence that plaintiff was in subjective bad faith at the outset of the action.

2. Plaintiff's counsel has confessed error of law in filing claims under 42 U.S.C 1985. However, that aspect of the case was quickly dismissed by the Court on a Rule 12 motion.

3. Plaintiff's counsel also confessed error of law in filing a claim for punitive damages against defendants, Heap and Department of Health and Human Resoucres. That aspect of the case, therefore, was groundless when filed.

4. Plaintiff's counsel has confessed that the claim against defendant, Heap, was without merit and properly dismissed inview of the fact that discovery revealed no direct involvement by that defendant in the employment actions of which plaintiff complained. It cannot be said, however, that the claim against defendant, Heap, was groundless when filed, despite the fact that subsequent discovery revealed no basis of liability of his part.

5. Plaintiff's counsel also argues that despite the dismissal of the claim against defendant, Fischer, on the basis of lack of direct involvement, plaintiff had a valid claim that defendant, Fischer, improperly disclosed the information plaintiff told him in confidence. That allegation was not asserted in the complaint or in opposition to the motion for summary

judgment and, therefore, that theory of liability may not properly be considered.

6. Despite the fact that various claims were either groundless when filed or later appeared to be unsupportable, the heart of this case was the claim under 42 U.S.C. 1983 against defendant, Charles Olivier. Mr. Olivier was plaintiff's immediate supervisor.

7. Plaintiff claimed that Mr. Olivier took various actions against him in retaliation for his complaining to defendant, Fischer, in May, 1980 concerning various activities of Mr. Olivier. Specifically, plaintiff claimed Mr. Olivier assigned him to the night shif, instituted an investigation into plaintiff's alleged misuse of state vehicles, suspended and ultimately terminated his employment, all in response to his allegations of wrongdoing.

8. The affidavits in support of the motion for summary judgment, which were uncontroverted, established that the decision to transfer plaintiff to the night shift was made and communicated to plaintiff prior to the date he allegedly made his charges against Mr. Olivier. The investigation into his alleged misuse of state vehicles also was in progress before he made his complaints. Therefore, neither the transfer nor the investigation into plaintiff's alleged misuse of state vehicles could have been responses to his complaint of wrongdoing.

9. However, it appears that plaintiff did not know that any investigation of his misuse of state vehicles was underway at the time he made his charges of misconduct against Mr. Olivier. He learned of his suspension and termiantion only after he

registered his complaints and sincerely believed that there was some casual connection.

10. In short, plaintiff failed to oppose the summary judgment on the civil rights claim against defendant, Olivier, not because he conceded his claim was without merit but becuase he felt he would be unable to bear the burden or proof at trial.

11. Plaintiff's claims were not brougt in bad faith and were not, as a whole, frivolous, unreasonable or groundless and plaintiff should not be charged with attorneys' fees simply because he refrained from dismissing a case he believed was meritorious but feared he could not prove.

12. A plaintiff should not be assessed his opponent's attorneys' fees unless the Court finds his claim was frivolous, unreasonable or groundless,

or that the plaintiff continued to litigate after it clearly became so. Christianburg Garment co. v. EEOC, 434 U.S. 412, 98 S.Ct., 694, 54 L.Ed.2d 648 (1977).

RECOMMENDATION

It is recommended that the motion for attorneys' fees be DENIED.

Failure to file written objections to the proposed findings and recommendations contained in the report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, July 28, 1983.

EILEEN GLEASON SHAVER

United States Magistrate

Respectfully Submitted,

DAVID W. OESTREICHER, II
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130
(504) 529-7666

RALPH S. WHALEN
OESTREICHER, WHALEN & HACKETT
307 Exchange Alley
New Orleans, Louisiana 70130
(504) 529-7666

CERTIFICATE OF SERVICE

I do hereby certify that I have this 31st day of March 1986, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing same by United States Mail, properly addressed, first class postage prepaid.

Supreme Court, U.S.
FILED
MAY 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1500

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROLAND V. ACOSTA,

Petitioner,

VERSUS

THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; MR. GEORGE FISCHER, HEAD OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES; MR. CHARLES OLIVIER, ADMINISTRATOR OF THE SOUTH LOUISIANA MEDICAL CENTER IN HOUMA, LOUISIANA; AND WAYNE HEAP, ASSISTANT SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION TO AFFIRM

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL

PATRICIA NALLEY BOWERS
ASSISTANT ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
234 LOYOLA AVENUE, 7TH FLOOR
NEW ORLEANS, LOUISIANA 70112
TELEPHONE: (504) 568-5575

COUNSEL FOR RESPONDENTS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED

Should a Notice of Appeal filed subsequent to announcement of a ruling on a Rule 59 Motion, but prior to entry of that ruling on the clerk's docket, be considered timely under Federal Rule of Appellate Procedure 4?

TABLE OF CONTENTS

Question Presented.....i
Table of Contents.....ii
Table of Authorities.....iii
Motion to Affirm.....1
Statement of the Case.....2
Summary of the Argument.....3
Argument.....4
Conclusion.....7
Certificate of Service.....8

TABLE OF AUTHORITIES

Cases

Griggs v. Provident Consumer Discount Co., *459 U.S. 56 (1982)*.....6

Van Wyk El Paso Inv., Inc. v. Dollar Rent-A-Car Systems, Inc., 719 F.2d 806 (5th Cir. 1983).....6

Statutes

Federal Rule of Appellate Procedure 4.....i,1,3,4,6,7

Federal Rule of Civil Procedure 59.....3,4

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

ROLAND V. ACOSTA,

Petitioner,

VERSUS

THE LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; MR. GEORGE FISCHER, HEAD OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES; MR. CHARLES OLIVIER, ADMINISTRATOR OF THE SOUTH LOUISIANA MEDICAL CENTER IN HOUMA, LOUISIANA; AND WAYNE HEAP, ASSISTANT SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Respondents.

MOTION TO AFFIRM

Appellees move, in accordance with Rule 16.1(c) of this Court's Rules, to affirm the judgment of the Court of Appeals for the Fifth Circuit. As is shown, the question on which the decision of this case depends is so unsubstantial as not to require briefs on the merits or oral argument for its resolution.

The judgment below was clearly correct. The Court of Appeals did no more than apply well-established doctrine concerning the Federal Rule of Appellate Procedure 4 to undisputed facts.

STATEMENT OF THE CASE

On September 29, 1981, plaintiff Roland V. Acosta brought suit against the Louisiana Department of Health and Human Resources, the Secretary and Assistant Secretary thereof, and a hospital administrator under 42 U.S.C. §§1983 & 1985. The §1985 claim was dismissed on a Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss on February 19, 1982. The remaining claims against all defendants were dismissed on a Motion for Summary Judgment on December 20, 1982.

Plaintiff filed a Notice of Appeal on January 26, 1983. On February 23, 1983, the Fifth Circuit granted defendants' Motion to Dismiss the Appeal.

The defendants then moved for attorneys' fees alleging that the complaint was filed in subjective bad faith and that it was frivolous, unreasonable and without foundation. On June 7, 1983 District Judge Patrick E. Carr issued an Order of Reference referring the matter to Magistrate Eileen Shaver to determine what attorneys' fees, if any, should be awarded to defendants.

On July 29, 1983, Magistrate Shaver issued Findings and Recommendations recommending that attorneys' fees be denied. Upon defendant's objections to those Findings and Recommendations, on April 10, 1984, Judge Carr rejected Magistrate Shaver's findings and determined that defendants were entitled to attorneys' fees. Judge Carr referred the matter to Magistrate Ronald A. Fonseca for a determination of the amount of attorneys' fees to be awarded. On May 21, 1984, Magistrate Fonseca recommended that the amount be $19,953.75. Judge Carr issued an Order awarding that amount to defendants on June 25, 1984.

Plaintiff filed a Motion to Alter or Amend the Judgment under F.R.C.P. 59 on July 3, 1984. On August 1, 1984, a hearing was held on the motion and a ruling was announced by the court from the bench that the motion was denied. That afternoon plaintiff's attorney filed a Notice of Appeal. Two days later, on August 3, 1984, the Judgment on the Motion to Alter or Amend was entered on the docket. The Notice of Appeal was therefore filed after the judge's announcement of his intent but prior to his signing of a final order and entry thereof.

Defendants filed a Motion to Dismiss the appeal alleging that the Fifth Circuit Court of Appeals lacked jurisdiction because the Notice of Appeal was filed prior to entry of the order denying the Motion to Alter or Amend the judgment. On March 15, 1985, a motions panel of the United States Court of Appeals for the Fifth Circuit denied defendants' motion to dismiss the appeal. On November 6, 1985, the appeals panel of the United States Court of Appeals for the Fifth Circuit dismissed the appeal holding that the Notice was not timely filed. Plaintiff petitioned for rehearing, and on December 5, 1985, it was denied.

SUMMARY OF ARGUMENT

Plaintiff filed his notice of appeal after the announcement of the District Court's denial of his F.R.C.P. 59 motion but prior to the entry of the District Court's order. The plaintiff did not file a new notice of appeal within the time limit prescribed by F.R.A.P. 4(a)(4). Thus, the Court of Appeals lacked jurisdiction to hear the appeal.

F.R.A.P. 4(a)(2) makes it clear that the general rule allowing the notice of appeal to be filed between announcement and entry does not apply when the motions

enumerated in 4(a)(4), which includes a Rule 59 motion to alter or amend the judgment, have been filed. In that situation, in the clear language of the Rule itself, "A *new* notice of appeal *must* be filed within the prescribed time measured from the *entry* of the order disposing of the motion as provided above".

ARGUMENT

The sole question presented to this Honorable Court by the petitioner for a writ of certiorari to the Court of Appeals for the Fifth Circuit is whether that court properly interpreted F.R.A.P. 4(a)(4). Subsequent to the District Court's judgment against plaintiff ordering him to pay substantial attorneys' fees to defendants for having brought a suit that was deemed frivolous, vexatious, and without foundation, plaintiff filed a Motion to Alter or Amend judgment under F.R.C.P. 59(e).

After the oral denial of plaintiff's F.R.C.P. 59 motion, but prior to the entry of the judge's order, plaintiff filed a notice of appeal in the District Court. Because plaintiff did not follow the clear language of F.R.A.P. 4, his notice of appeal had absolutely no effect. Plaintiff did not file an additional notice of appeal after the entry of the District Court's final order and thus he allowed his time for appeal to elapse.

F.R.A.P. 4(a)(4) states (in pertinent part):

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party ... (iii) under Rule 59 to alter or amend the judgment ... the time for appeal for all parties *shall run from the entry* of the order ... granting or denying any other such motion. A notice of appeal filed before the disposition of any of the

> above motions *shall have no effect.* A *new notice* of appeal *must* be filed *within the prescribed time measured from the entry* of the order disposing of the motion as provided above... (Emphasis added).

Plaintiff admits that his appeal from the District Court was governed by this Rule. Plaintiff's only contention is that the Court of Appeals erred in its definition of "disposition" as quoted above. Whereas the Court of Appeals read "disposition" to mean the *entry* of the order, plaintiff desired that Court to read "disposition" as *announcement* of the order. In effect, plaintiff wishes to overlook the entire body of the Rule in order to take the word "disposition" out of context.

Section (a)(4) of Rule 4 is specific in establishing a distinct time within which a notice of appeal *must* be filed. It is specific in stating that this time period begins *from the entry* of the order granting or denying a motion covered by this section. Defendants respectfully urge that there can be no alternative reading of the Rule.

Plaintiff's contention is more clearly unfounded and illogical in light of Section (a)(2) of the Rule. This Section reads:

> *Except as provided* in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof. (Emphasis added).

Thus this Section clearly indicates that the general allowing of the notice of appeal to be filed between announcement and entry *will not apply* when the motions

enumerated in F.R.A.P. 4(a)(4) have been filed. Plaintiff cannot simultaneously admit that F.R.A.P. 4 (a)(4) governs his case while asking that his notice be treated under F.R.A.P. 4(a)(2).

Moreover, the Fifth Circuit's reading of Rule 4(a)(4) is consistent with this Court's interpretation of the Rule. In *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), the respondent filed a notice of appeal while a motion to alter or amend judgment was pending before the District Court. Addressing the question posed by an untimely notice of appeal, this Court stated:

> Under the plain language of the current Rule, a premature notice of appeal "shall have no effect"; a new notice of appeal "must be filed." In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is "mandatory and jurisdictional." 459 U.S. at 61.

The Court of Appeals also relied on *Griggs, supra*, in *Van Wyk El Paso Inv., Inc. v. Dollar Rent-A-Car Systems, Inc.*, 719 F. 2d 806 (5th Cir. 1983). There, a notice of appeal was filed after the judge's lawclerk had notified counsel of the District Judge's decision on the motion to reconsider, but before the order officially denying the motion was entered. The court held that the notice filed was ineffective and that the court lacked jurisdiction to hear the appeal.

CONCLUSION

This court must affirm the Court of Appeals ruling on the application of F.R.A.P. 4(a)(4). The petitioner has alleged no facts or error of law that in any way indicate an error by the Court below.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL

KENDALL L. VICK
ASSISTANT ATTORNEY GENERAL

By: _____
PATRICIA NALLEY BOWERS
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court representing the Respondents herein and that two copies of the above Motion to Affirm in response to a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit were served upon counsel for Petitioner, first class postage prepaid, addressed to their offices in New Orleans, Louisiana, this 7th day of May 1986.

PATRICIA NALLEY BOWERS

SUPREME COURT OF THE UNITED STATES

ROLAND V. ACOSTA *v.* LOUISIANA DEPARTMENT OF HEALTH AND HUMAN RESOURCES ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85–1500. Decided June 30, 1986

PER CURIAM.

In 1981, petitioner filed a civil rights action against respondents. Respondents moved to dismiss, and the District Court dismissed the action in its entirety. Petitioner filed, and then abandoned, an appeal. Respondents then moved in the District Court for an award of attorney's fees on the ground that petitioner had filed his action in bad faith. The court granted the motion and awarded respondents fees amounting to some $19,000. Petitioner filed a timely motion to alter or amend the judgment, as authorized by Federal Rule of Civil Procedure 59(e). The District Court held a hearing on the motion and denied it from the bench. Petitioner filed a notice of appeal that same afternoon. Not until two days later, however, was the order denying the motion to alter or amend the judgment entered on the docket. Petitioner did not file a new notice of appeal following the docket entry.

The United States Court of Appeals for the Fifth Circuit dismissed petitioner's appeal, ruling that the notice of appeal was prematurely filed. The Court of Appeals relied on Federal Rule of Appellate Procedure 4(a)(4), which, in pertinent part, provides:

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party . . . under Rule 59 to alter or amend the judgment . . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying any . . . such motion.

> A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above."

The court concluded that because petitioner filed his notice of appeal before the order disposing of the Rule 59 motion, Rule 4(a)(4) required it to treat the notice as a "nullity" and thus deprived the court of jurisdiction over the appeal.

The Fifth Circuit's interpretation of Rule 4(a)(4) is directly contrary to that adopted by the Court of Appeals for the Ninth Circuit in *Calhoun* v. *United States*, 647 F. 2d 6 (1981). There, the court held that the Rule's command that "[a] notice of appeal filed before the disposition of [a Rule 59 motion] shall have no effect," did not render a notice of appeal filed after the announcement of the decision on the motion but before the entry of the order a nullity. Rather, the court concluded that the term "disposition" as used in the rule was synonymous with "announcement"; accordingly, a notice of appeal could be given effect as long as it was filed after the trial court's announcement of its ruling. The Ninth Circuit concluded that this interpretation of the Rule was justified by "the policy of 'exercising all proper means to prevent the loss of valuable rights when the validity of an appeal is challenged not because something was done too late, but rather because it was done too soon.'" 647 F. 2d, at 10 (quoting *Williams* v. *Town of Okoboji*, 599 F. 2d 238, 239–240 (CA8 1979)). The court reasoned that if a notice filed before entry of the order were deemed defective, "valuable rights [might] be lost because an important, but ministerial, act was not performed when expected." *Id.*, at 11.

Because such a direct conflict over the interpretation of the Rules of Appellate Procedure calls for resolution in this Court, we grant the petition for a writ of certiorari.* Find-

---

*Accordingly, respondents' motion for an award of damages on the ground that the petition is frivolous is denied.

ing that the issue is not one that requires plenary consideration, we now affirm the judgment of the Court of Appeals.

Unlike the decision of the Ninth Circuit in *Calhoun*, the decision below comports with the plain wording of the rules. Rule 4(a)(4) specifically states that a notice of appeal, to be effective, must be "filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." Further, Rule 4(a)(2) provides that, "*[e]xcept as provided in (a)(4) of this Rule 4*, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof" (emphasis added). The plain import of this language is that with respect to the particular motions to which it applies, Rule 4(a)(4) constitutes an exception to the general rule that a notice of appeal filed after announcement of an order but before its entry in the docket will be deemed timely filed. The Ninth Circuit's *Calhoun* rule essentially reads the first clause of subdivision (a)(2) out of Rule 4 by holding that Rule 4(a)(4) does *not* constitute such an exception. But if subdivision (a)(2) is taken seriously, it is untenable to read subdivision (a)(4) except as the Fifth Circuit has read it in this case: that is, as establishing the rule that a notice of appeal is ineffective unless filed after entry of judgment on a Rule 59 motion or any of the other motions to which the subdivision applies.

The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE BRENNAN would grant the petition for certiorari and set the case for oral argument.

JUSTICE MARSHALL dissents from this summary disposition, which has been ordered without affording the parties prior notice or an opportunity to file briefs on the merits. See, *e. g.*, *Allen* v. *Hardy*, —— U. S. —— (1986); *City of Los Angeles* v. *Heller*, —— U. S. —— (1986); *Maggio* v.

Fulford, 462 U. S. 111, 120–121 (1983) (MARSHALL, J., dissenting).